

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 47122/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE : 15 June 2023

SIGNATURE

In the matter between:

NQORILE CC

FIRST APPLICANT

MOKGOSI SIMPHIWE M. M. PULE

SECOND APPLICANT

And

ESKOM HOLDINGS SOC LIMITED

RESPONDENT

In re:

ESKOM HOLDINGS SOC LIMITED

APPLICANT

And

NQORILE CC

FIRST RESPONDENT

MOKGOSI SIPHIWE M.M. PULE

SECOND RESPONDENT

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further

uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 15 June 2023.

RULING APPLICATION FOR CONDONATION IN RE APPLICATION FOR

LEAVE TO APPEAL

COLLIS J

1. This is an application for leave to appeal against the judgment and order made on 28 February 2023.

2. The application is premised on the grounds as listed in the Application for Leave to Appeal dated 23 March 2023. Simultaneously with the filing of the application for leave to appeal, the applicants also filed a condonation application for the late filing of the application for leave to appeal.

3. In anticipation of the hearing of the application for leave to appeal, the parties were requested to file short heads of argument. They both acceded to this request so directed by the Court.

LEGAL PRINCIPLES

4. Section 17 of the Superior Court's Act provides as follows:¹

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success; or

¹ Act 10 of 2013

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought to appeal does not fall within the ambit of section 16(2)(a);
and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

5. *In casu* the applicants in their application for leave to appeal failed to expressly rely on either or both grounds of appeal mentioned in section 17(1)(a) of the Superior Courts Act 10 of 2013, namely, that the appeal would have reasonable prospects of success and/or that there are compelling reasons justifying the appeal.

6. The test to be applied by a court in considering an application for leave to appeal, Bertelsmann J in *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para 6 stated the following:

‘It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. The use of the word “would” in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.’

7. ‘In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established

than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.’²

8. Further, in *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa and Another*³ the Full Court of this Division observed that:

“As such, in considering the application for leave to appeal it is crucial for this Court to remain cognizant of the higher threshold that needs to be met before leave to appeal may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will, not might, find differently on both facts and law. It is against this background that we consider the most pivotal grounds of appeal.”

9. As the applicants elected to file a substantive application for condonation, which application was opposed by the respondent, this court directed that the parties should first address the court on the condonation application. As such, this ruling, traverses the arguments presented before the Court on the said condonation application.

CONDONATION

10. In the affidavit filed in support of the condonation application, the deponent sets out, that this court having handed down its judgment on 28 February 2023 the application for leave to appeal should have been filed by no later than 22 March 2023, whereas same was only filed on 23 March 2023. Thus, the application is a day late.

11. As for the explanation for the lateness, the deponent explains that albeit that counsel on brief was instructed as early as 1 March 2023, that it was only on 22 March 2023 that counsel advise the instructing attorney that he has suffered a bereavement and as a result was unable to prepare the application for leave to appeal timeously.

² S v Smith 2012 (1) SACR 567 (SCA) at para 7.

³ Case no: 21688/2020 [2020] ZAGPPHC 311 (24 July 2020) at [6].

12. It is for this reason that correspondence was directed to the respondents' attorneys and they were advised of the delay and an indulgence with regard to the extension of time was sought. This request however was not acceded to.

13. The reason for the lateness counsel for the applicants had argued had been properly explained and that this explanation together with the fact that the applicants enjoy good prospects of success on appeal, should result that this court should exercise its discretion on good cause shown in favour of the applicants.

14. The respondent as mentioned opposes the condonation application. In this regard the deponent to the answering affidavit sets out that the applicants had failed to properly deal with the entire period between 1 March 2023 (*when counsel was first instructed*) and 22 March 2023 (*when the application for leave to appeal fell due*). It is for this reason that the deponent contends that the explanation furnished by the applicants are flimsy in the circumstances and that the lack of an explanation is further exacerbated by a lack of prospects of success on the merits.

15. As for the merits, the respondent submitted that the applicants misconstrue and misinterpret the express terms of the agreement and that this was comprehensively dealt with in the affidavit filed in support of the summary judgment application and as such counsel for the respondent had submitted that the applicants' prospects of success on the merits is weak.

ANALYSIS

16. The provisions of rule 27(1) reads as follows:

'(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.'

17. From previous caselaw, two principal requirements for the favourable exercise of the court's discretion have crystallized out. Firstly, the applicant should file an affidavit satisfactorily explaining the delay⁴ to enable the court to understand how his delay came about and to assess his conduct and motives and secondly, the applicant must satisfy the court that he has a bona fide defence.⁵

18. To the matter at hand, the applicants have failed to satisfactorily explain the delay for the entire period from 1 March 2023 to 22 March 2023, save to say that counsel on brief had suffered a bereavement. Details as to when the bereavement had occurred and the subsequent period it took counsel out of office has not been explained, let alone satisfactorily explained. As such this Court is unable to understand fully the explanation of the default and consequent lateness.

19. As to the bona fide defence, same was traversed in the judgment of this court and fully dealt with at the time.

20. Consequently, I am not persuaded that the applicants have set up reasons for this court exercising its judicial discretion on good cause shown in its favour.

ORDER

21. As a result the application for condonation is refused with costs on an Attorney and Client scale.

COLLIS J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

⁴ Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC) AT 477E-G.

⁵ Dalhouzie v Bouwer 1970 (4) SA 566 (C) at 571F

APPEARANCES

Counsel for Applicants: Adv. C.I Mokwena

Instructed By: Pule Incorporated

Attorney for Respondent: Adv. M. Makgato

Instructed By : Dyason Attorneys.

Date of Hearing: 19 May 2023

Date of Judgment: 15 June 2023